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No. 257

Supreme Court of the United States,

OCTOBER TERM, 1920.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Respondent,

against

CHARLES D. NEWTON, as Attorney General of the State of New York, EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District,
Appellants.

MEMORANDUM AND AFFIDAVIT FOR RESPONDENT, IN OPPOSITION TO MOTION TO ADVANCE.

JOHN A. GARVER,
Counsel for Respondent,
55 Wall Street,
New York.

The Evening Post Job Printing Office, Inc., 154 Fulton St., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1920.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Respondent,

AGAINST

CHARLES D. NEWTON, as Attorney General of the State of New York, EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District,
Appellants.

MEMORANDUM IN OPPOSITION TO MOTION TO ADVANCE.

I. The motion to advance was dated March 8, 1921, served March 9, returnable March 14. On March 14, the appeal had not been docketed; and it will probably not be docketed before March 18. Until it is docketed, there is nothing to advance "on the docket."

Until an appeal has actually been placed on the docket, a motion to advance cannot be made. Were the rule otherwise, an appellant might give notice to advance as soon as an appeal was taken and

weeks or months before the case was docketed. Obviously, a respondent cannot be brought into court by notice of a motion to advance, when the appellant is not in position to make the motion at the time the notice is served.

II. The moving papers show that the decree appealed from was entered in the early part of August, 1920. The appeal was taken on September 9, 1920, and was made returnable on October 9, 1920 (see annexed affidavit), more than five months ago. No reason is given for this long delay in filing the record and docketing the case, although the portion of the decree set forth in the moving papers (p. 5) expressly imposed the condition "that the defendants and each of them shall perfect and prosecute any such appeal and print and file the record and all necessary papers to that end promptly and without delay."

In the absence of a conclusive reason for this prolonged delay, nothing but the most controlling urgency of public interest would justify the Court in doing for the appellants what they have failed to do for themselves.

III. From the annexed affidavit, it appears that the interests of the consumers of gas supplied by the respondent have been completely protected and that the entire amount collected by the Company, since the entry of the decree, in excess of the eighty-cent rate, has been impounded for their benefit.

IV. There are no questions of great public importance involved in the present appeal. The respondent Company has merely availed itself of the privilege given to it by this Court upon the former

appeal (212 U. S. 19, 54), and has shown the actual result of its operations under the eighty-cent rate. The questions raised in the defendants' appeal were involved on the former appeal. The Court there reached the conclusion, that, while the Company was entitled to a return of six per cent. on the reasonable value of its property devoted to the public use, yet the evidence left the question in some doubt; and the Court thought that this doubt should be resolved by a practical test of the effect of the statutory rate.

In view of the information which the Court already possesses in regard to the property and business of the Company and of its knowledge of the increased cost of labor and materials (coal and oil, particularly) applicable to this industry, it will certainly conclude that the decree appealed from is presumptively correct. In a recent decision, the Court has taken judicial notice of the high rates charged for capital, implying a higher return upon the investment than the six per cent. which was normal before the great war.

Lincoln Gas Co. *v.* Lincoln, 250 U. S. 256, 268.

In directing the judgment in the court below, his Honor, Judge Learned Hand, expressly resolved every doubt against the Company and in favor of the defendants (see annexed affidavit).

V. The moving papers show that many other cases involving the rates charged by the various gas companies in New York City are now pending. Some of these cases have already been disposed of in favor of the companies, and appeals have been taken to this Court (see annexed affidavit). In

most, if not in all of these cases, the record can be filed and the cases can be docketed in time for the October, 1921, Term. And they could all be heard together, if this Court should so order.

VI. In New York, the Public Service Commissions Law confers full power upon the Commission to regulate the rates of gas companies and other public utilities. In the case of gas companies, however, the law contains a limitation (Sec. 72) upon the power of the Commission to establish a rate in excess of that fixed by statute; and Chapter 125 of the Laws of 1906 fixed a maximum rate of eighty cents.

People *ex rel.* Municipal Gas Co. *v.* P. S. C., 224 N. Y. 156.

VII. As the result of this limitation upon the power of the Commission to increase a rate, the respondent was obliged to resort to the Court for relief. A bill is now pending before the New York State Legislature, to amend the Public Service Commissions Law, by removing, among other things, this restriction upon the powers of the Commission; and it is expected that this amendment will be made during the present month (see annexed affidavit). If this should be done, the Public Service Commission will then have power to determine and fix a rate for the respondent Company and the other gas companies in New York; in which event, the questions involved in the defendants' appeal may become largely academic.

Washington, March 18, 1921.

JOHN A. GARVER,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1920.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Respondent,

AGAINST

CHARLES D. NEWTON, as Attorney General of the State of New York, EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District,
Appellants.

AFFIDAVIT OF CHARLES A. VILAS.

STATE OF NEW YORK, }
County of New York, } ss.:

CHARLES A. VILAS, being duly sworn, says:

1. I am an attorney and counselor-at-law, associated with the firm of Shearman & Sterling, solicitors for the respondent Consolidated Gas Company; and I am familiar with all the proceedings which have been had in this suit. I have read the petition of the appellants to advance this cause, dated March 8, 1921.

2. The papers entitled "motion to advance" were served upon counsel for the respondent on March

9, 1921. On March 14, the date named in the motion papers, the appeal had not been docketed in this court. It has not yet been docketed; and I am informed and believe that it is not probable that the appeal will be docketed before March 18, 1921.

3. The appeal herein was taken by the defendants on September 9, 1920, and was made returnable on October 9, 1920. The time for transmitting the record has been extended, from time to time, with the consent of the respondent, at the request of the appellants. When completed, the record will contain about 16,000 printed pages of testimony and about 4,000 printed pages of exhibits.

4. The same statute was the subject of a prior suit which was before this Court in 1909 (Willcox v. Consolidated Gas Co., 212 U. S. 19). At that time, the rate prescribed by the statute had not been in force. This Court reversed a decree in favor of the complainant, without prejudice, saying (p. 54):

> "It may possibly be, however, that a practical experience of the effect of the Acts by actual operation under them, might prevent the complainant from obtaining a fair return, as already described, and in that event complainant ought to have the opportunity of again presenting its case to the court."

5. In the present case, the Special Master, after a long and thorough trial, found the net cost of gas delivered to the consumer, as of September, 1919, to be 75.18¢ per thousand cubic feet, leaving for return on investment not more than 4.73¢ per thousand cubic feet of gas sold, representing no more than a return of 1.2%, or $898,700, upon the

amount found to be invested in the property used in the gas business. He further found that the reasonable and proper rate of return upon the capital invested in the complainant's property was at the rate of 8% per annum, amounting to $5,988,348.09.

6. In reviewing the Master's findings, the District Court (Judge Learned Hand) expressly stated that there had been eliminated as against the complainant's contention all possible doubtful items, and that the defendants had been given the benefit of every possible doubt, in the complainant's figures. In explaining the methods of arriving at such a calculation, the District Court said:

> "It is scarcely possible that a rate fixed in 1906 to give a fair return and presumably no more than a fair return, should today be adequate. In the figures I have used, I think it clear that everything has been pared down unsparingly, and I take this occasion to say what I have already alluded to more than once already. It would be most unfair to accept any of these figures in fixing a rate. The attitude of a court is very different; it does not try to do justice between the company and the public, but only to see whether the actual rate can by any possibility still be a fair rate. In so doing, it must take everything in favor of the rate. It would be the height of injustice, if, in view of that attitude, its conclusions so reached were treated as a fair basis for fixing a new rate. Furthermore, I have not hesitated to cut more ruthlessly in this case than if the result had been closer."

7. The consumers of the complainant are completely protected pending the appeal in this case as to any amount of money they may pay to the re-

spondent Company in excess of eighty cents per thousand cubic feet. For all such excess, securities or surety bonds have been duly deposited with a Master appointed by the Court for the purpose.

8. There are no unusual or difficult questions of law involved in this suit. Substantially all of the questions raised by the defendants' appeal were involved upon the former appeal (212 U. S. 19).

9. Under the Public Service Commissions Law of the State of New York (Laws 1907, Chap. 429), the Commission is given complete regulatory powers over gas companies, including the power to regulate rates. Section 72 of the Law, however, provides that no rate shall be established by the Commission in excess of that fixed by statute; and Chapter 125 of the Laws of 1906 fixes a maximum rate of eighty cents, which is the rate attacked in the present suit. It was only by reason of this restriction upon the power of the Commission that it became necessary for the respondent Company to bring the present suit.

10. I am informed and believe that all the gas companies operating in the City of New York have instituted suits attacking the validity of the statutes which limit the maximum rates to be charged by them. Of the suits referred to in the appellants' petition to advance, final decrees have been entered in the following cases:

New York and Queens Gas Company,
Consolidated Gas Company,
Kings County Lighting Company;

and, in each case, an appeal has been taken by the defendants to this Court, although the record has not yet been filed with the Clerk of the Court.

In the other cases, the trials are proceeding and will be shortly concluded; and in the cases of the Central Union Gas Company, Northern Union Gas Company and Brooklyn Union Gas Company, reports of the Special Master in favor of the complainant are now before the District Court for confirmation. As the record in those cases will be much smaller than that in the present case, I see no reason why the appeals in all of them should not be placed on the October, 1921, docket of this Court.

11. A bill is now pending before the New York Legislature to amend the Public Service Commissions Law in various respects, including the removal of this limitation upon the powers of the Commission. I am reliably informed and believe that this bill will be passed, probably before the expiration of the present month. If that should be the case, the power of the Commission to establish a rate for the respondent Company would be absolute, and the questions involved in the defendants' appeal would become largely academic.

CHARLES A. VILAS.

Sworn to before me,
March 17, 1921.
ARTHUR C. POWER,
Notary Public, Kings County
County Clerks No. 197 Registers No. 1122
Cert. Filed in N. Y. Co. Clerks No. 329 Reg. No. 1351
Bronx Co. Clerk's No. 19 Reg. 2150
Term Expires March 30, 1921.